



November 8, 2010

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Re: Docket Number EPA-R03-OW-2010-0736
Draft Chesapeake Bay TMDL

To Whom It May Concern:

This letter contains comments on the draft Chesapeake Bay TMDL (the “Draft TMDL”), published for public review and comment at 75 FED. REG. 57776 (Sept. 22, 2010)(the “Notice”). I am writing on behalf of a manufacturing client that has requested to remain anonymous, but that believes that the Draft TMDL, if published as final, will have a dramatic impact on their manufacturing operations in the Chesapeake Bay watershed. These comments are not specific to any individual segment or source covered by the Draft TMDL, but address overall concerns with its promulgation, character and implementation.

1. The Notice fails to acknowledge that it constitutes a notice of proposed rulemaking, subject to the processes and procedures of the Administrative Procedures Act. Failure to make this clear to the public is in itself a violation of the Administrative Procedures Act (“APA”) and principles of administrative law that pre-date the enactment of the APA.

2. EPA has failed to provide a long enough review period. The Draft TMDL is 365 pages in length with 23 appendices totaling 262 pages, which include seven tables with a total of approximately 22,000 rows of data and information in those tables. Three of these tables list cap loads for all point sources, significant and insignificant. Providing only 45 calendar days to digest the proposed regulation and articulate comments is insufficient under the APA and violates procedural and substantive Due Process rights.

We understand that EPA is pointing to the multiyear development process and the interaction with the States as justification for denying requests to extend the comment period. This justification is self-serving and fails to appreciate the difficulties that the public has in even understanding the Draft TMDL, much less the methodology employed in the development of the individual source load caps. There are 4,390 insignificant point sources listed in Draft TMDL’s tables, many of which are unaware of the existence of the Draft TMDL, much less the impact the Draft TMDL will have on their lives and businesses. EPA’s failure to accommodate the public’s learning curve on this important action is contrary to principles of good governance.

3. At least with regard to Pennsylvania, the Draft TMDL differs significantly from state Watershed Implementation Plan ("WIP"), without explanation or examination of the state's reasoning for its proposal. The Pennsylvania WIP allocated 1,820,139 pounds per year of Total Nitrogen ("TN"). The Draft TMDL allows only 413,449 pounds per year of TN. The Pennsylvania WIP allocated 64,683 pounds per year of Total Phosphorus ("TP"). The Draft TMDL allows only 4,181 pounds per year of TP. The Draft TMDL fails to explain the basis for this extreme differential and to provide adequate analysis of the Pennsylvania WIP and the assumptions and goals underlying it.

4. Looking at the cap loads resulting from the Pennsylvania WIP, many industrial dischargers were examining very expensive but mostly financially-bearable capital upgrades. Now, with the Draft TMDL threatening, these industries will be forced to look at the viability of their operations, not mere capital upgrades. While the importance of the Bay is beyond a doubt, if the industrial base of the Susquehanna River watershed is eviscerated, the environmental benefits of the Draft TMDL will quickly be overshadowed by the financial upheaval created. Given its very significant economic impact and the direct impact on the States, the Draft TMDL should have been subject to cost-benefit and economic impact analysis. Failing to do so violates Executive Orders 12866 and 13132, as well as the Unfunded Mandates Reform Act of 1995. Considering that the source cap loads cover thousands of lightly regulated dischargers (including a handful of individual residences), EPA should also have examined it in light of the Small Business Regulatory Enforcement Fairness Act of 1996, which requires that a Regulatory Flexibility Analysis be performed if a regulation will have a significant financial impact on a substantial number of small businesses.

5. The Draft TMDL fails to explain how the government decided to allocate cap loads by industry, so that it is impossible to determine if the allocation is rational. For example, in the Pennsylvania allocation, some industries got merely 1% of the TN cap load and some were allocated 49%. Such distinctions may very well be justified, but failing to explain them is not.

6. The Draft TMDL fails to explain why the Pennsylvania industrial cap loads are significantly lower than its municipal cap loads. In the Draft TMDL, municipal point source cap load allocations were based on 3 mg/l of TN and 0.1 mg/L of TP and insignificant municipal point sources on 8 mg/L of TN and 2 mg/L of TP at design flow conditions. The industrial cap loads are significantly lower, for some significant industrial dischargers as low as 0.46 mg/L of TN and 0.003 mg/L of TP. Several "insignificant" industrial point sources were even given cap loads of zero (0) pounds per year of TP, which is inexplicable. Failing to describe the basis of these allocations is a fundamental flaw and is a stark example of how the Draft TMDL is arbitrary and capricious.

7. The Draft TMDL gives limits to many industrial facilities that are less than the limit of treatment technology at design flow conditions. The cap loads cannot be achieved when the industry must treat the wastewater to reduce the concentrations of TN or TP in the discharge. This condition forces every industrial facility, as it approaches design conditions, to purchase nutrient credits, if it can. However, for those facilities that discharge to streams that are already nutrient impaired, purchasing of nutrient credits is not allowed by the PA DEP. In effect, this

amounts to a governmental directive to close these facilities. By failing to describe the path forward for facilities in such circumstances, EPA fails its responsibilities to the public and violates the APA.

8. The Draft TMDL is a model-driven regulation. Models are, by their nature, imperfect representations of reality and are inordinately capable of manipulation. The Draft TMDL naively reduces the complexity of the model to discharge specific cap loads, which will likely be translated into mass limits to be applied through NPDES permits. The parsing of a model for direct application to dischargers without an opportunity for each individual permittee to examine the basis for the model is contrary to traditional notions of fair play and violates the due process clause and the APA.

In addition, we understand that the model itself fails to accommodate the reality of the Bay ecosystem. The United States Geological Service (USGS) conducted a multi-year study in the Chesapeake watershed of nitrate in ground water. The 2002 report (USGS Fact Sheet FS-091-03) states:

An average of 48 percent of the nitrogen load in streams in the Bay watershed was transported through ground water, with a range of 17 to 80 percent in different streams.

The report also found that, due to lag time, the median “age” of the pollution in this groundwater is 10 years, with 25 percent of the samples having an age of 7 years or less and 75 percent of the samples having an age of up to 13 years. If the model does not accommodate the fact that 48 percent of the nitrogen load in streams in the Bay watershed is transported through ground water, one must wonder what other factors were missed in the modeling exercise. Failing to include groundwater flow in the modeling exercise is arbitrary and capricious.

Thank you for your attention to these comments.

Very truly yours,

s/Patrick H. Zaepfel

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